Flat Dog Productions, Inc.; Frank T. Demartini, P.C.; Frank T. Demartini, Individually; Dragon Productions A.V.V.* ***and*** **International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, AFL–CIO.** Case 31–CA–24062

August 31, 2006

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On November 24, 2003, Administrative Law Judge Lana H. Parke issued the attached supplemental decision. The Respondents filed exceptions and a supporting brief, a brief in answer to the General Counsel's limited exceptions, and a reply brief. The General Counsel filed limited exceptions and a brief in answer to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this supplemental decision and to adopt the recommended Order as modified and set forth in full below.

In this compliance-stage proceeding, we consider whether Respondents Frank T. DeMartini, P.C. (the P.C.) and Frank T. DeMartini (DeMartini), an individual, should be held derivatively liable for backpay owed by Respondent Flat Dog Productions, Inc. (Flat Dog).[2] The judge found that Flat Dog and the P.C. are alter egos and a single employer, and therefore concluded that the P.C. is derivatively liable for Flat Dog's backpay obligation. She further found that, under the circumstances of this case, the corporate veils of both Flat Dog and the P.C. should be pierced to hold DeMartini personally liable for the backpay due. The Respondents except to each of these findings.

As explained below, we agree with the judge that Flat Dog and the P.C. are a single employer. Because the P.C. is liable on this basis, we find it unnecessary to pass on whether the P.C. may be liable on an alter ego theory. We disagree, however, with the judge's finding that the corporate veils of Flat Dog and the P.C. should be pierced and DeMartini held personally liable for their remedial obligations**.** We therefore reverse the judge and conclude that DeMartini is not personally liable for these remedial obligations.

I. FACTUAL BACKGROUND

DeMartini is an attorney who has provided legal services for about 100 films over the course of his legal career, which began in 1986. Since 1994, he has also served as a producer or coproducer on several films. Around 1992, DeMartini established the P.C. as a solo law practice. The P.C. also serves, at least in part**,** as a "loan-out corporation"—that is, a corporation that has the exclusive right to "loan out" DeMartini's services as a producer.[3] At all relevant times, DeMartini has been the sole employee, shareholder, and director of the P.C., occupying the roles of chief executive officer, chief financial officer, and secretary.

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* At the hearing, the General Counsel withdrew all allegations relating to Dragon Productions A.V.V. (Dragon), representing that the Region had been unable to effect service of process on Dragon, a Dutch Antilles corporation.

[1] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In the underlying unfair labor practice case, 331 NLRB 1571 (2000), enfd. 34 Fed. Appx. 548 (9th Cir. 2002), the Board found that Respondent Flat Dog, through its agent DeMartini, had violated Sec. 8(a)(3) and (1) of the Act by discharging employees for engaging in an economic strike. The Board ordered Flat Dog, inter alia, to make the unlawfully discharged employees whole for any and all losses they incurred as a result of Flat Dog's unlawful action. Thereafter, controversies arose over allegations in the General Counsel's compliance specification relating to the backpay period, the amounts of backpay due, and the identification of the discriminatees, as well as the issues of derivative liability addressed in this decision. The judge approved the General Counsel's determination of the backpay period, and found that 21 of the 23 employees named in the compliance specification were properly identified as discriminatees and were entitled to the backpay alleged. The Respondents except to these findings on various grounds. We find no merit in these exceptions and therefore adopt the judge's analysis and findings with regard to the backpay period, backpay amounts, and discriminatee identification.

Excepting to the judge's findings with regard to the backpay period, the Respondents contend that their backpay liability terminated at some unspecified time between August 17 and 20, 1999, when DeMartini purportedly made valid offers of reinstatement to the strikers. However, the legal effect of DeMartini's conduct toward the strikers between August 17 and 20, 1999[,] was litigated and decided at the merits stage of this case. See *Flat Dog Productions*, 331 NLRB at 1571 (finding that DeMartini's conduct between August 17 and 20 effected the strikers' discharge). Issues litigated and decided in an unfair labor practice proceeding may not be relitigated in the ensuing backpay proceeding. *Transport Service Co.*, 314 NLRB 458, 459 (1994). Accordingly, the Respondents' argument in this regard is precluded.

[3] DeMartini testified that it is customary in the film industry for producers to form such loan-out corporations in order to avoid contracting in their personal capacities with those seeking their services.

In late 1998 or early 1999, the P.C. entered into a development deal with a film distributor to produce a "creature feature" film about crocodiles attacking college students (the Film). To carry out the production of the Film, the P.C. incorporated Flat Dog under the name "Flat Dog Corporation." At all relevant times, the P.C. has been the sole shareholder of Flat Dog, and DeMartini has been Flat Dog's chief executive officer, chief financial officer, secretary, and sole director. DeMartini also served as a producer on the Film, pursuant to a loan-out arrangement of the type described above. DeMartini testified without contradiction that Flat Dog, having contracted with the P.C., paid him $35,000 for his services.

The P.C. provided the initial capital for Flat Dog. However, Dragon Productions A.V.V. (Dragon), a third-party lender, primarily financed the Film. Dragon and Flat Dog entered into a loan agreement on July 19, 1999 (GC Exh. 14).[4] The loan agreement specified that, in the event of Flat Dog's default, Dragon had the right to terminate the loan agreement and require Flat Dog to repay the loan. If Flat Dog failed to comply with this demand within 48 hours, the loan agreement gave Dragon the further right to require that Flat Dog transfer all its rights in the Film to Dragon "in full settlement of the Loan" (GC Exh. 14, par. 8). Flat Dog was obligated, by the terms of the loan agreement, to comply with such a request. Even after the transfer of film rights, the loan agreement gave Dragon the right to require Flat Dog to complete production of the Film. The loan agreement defined "default" as, inter alia, cessation of principal photography before all scenes in the final shooting script had been shot.

Flat Dog began filming in Los Angeles in early August, with a production crew hired by DeMartini. On August 17, several members of the crew began an economic strike and joined the International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, AFL–CIO (the Union) in picketing at the site of filming. DeMartini initially reacted to the strike by declaring the day a nonworkday, but later approached the picket line and told the strikers that they were terminated. Over the following 2 days, DeMartini offered the strikers financial incentives to return to work and referred to those who persisted in striking as "former employees."[5] On August 20, having failed to negotiate an end to the strike and picketing, DeMartini closed the production.

The same day, upon learning that the production had been closed, counsel for Dragon notified Flat Dog that, by ceasing principal photography, Flat Dog had effectively defaulted on its obligations under the loan agreement.[6] Invoking the default provisions of that agreement, Dragon demanded that Flat Dog repay the loan in full within 48 hours and reminded Flat Dog that failure to repay the loan could result in Flat Dog's loss of all rights in the Film. On August 24, having received no repayment of the loan as demanded, Dragon requested that Flat Dog transfer all rights in the Film to Dragon "in full settlement [of the] Production Loan" (GC Exh. 16, encl. p. 1). In accordance with the loan agreement, Flat Dog complied.

The transfer of film rights to Dragon was executed on August 24. In early September, Dragon reopened production in Mexico. Although Flat Dog had relinquished its film rights, DeMartini agreed to continue as producer of the Film, both in his individual capacity, and as an officer of Flat Dog**.** Repayment of the loan having been forgiven upon transfer of the rights to the Film from Flat Dog to Dragon, Flat Dog received no further compensation for its services during the Mexico phase of production, which ended on September 25.

II. DISCUSSION

A. Liability of the P.C., as a Single Employer with Flat Dog

As stated above, the judge found that Flat Dog and the P.C. constitute a single employer. The Respondents except to that finding. In determining whether two entities constitute a single employer, the Board considers four factors: common control over labor relations, common management, common ownership, and interrelation of operations. *Emsing's Supermarket, Inc.*, 284 NLRB 302 (1987), enfd. 872 F.2d 1279 (7th Cir. 1989).[7] No single

[4] All dates hereafter are in 1999, unless otherwise specified.

[5] The Board found in the underlying unfair labor practice case that, by this course of conduct, Respondent Flat Dog had discharged the strikers in violation of Sec. 8(3) and (1) of the Act. *Flat Dog Productions*, 331 NLRB at 1571.

[6] With respect to the loan agreement between Dragon and Flat Dog, both parties were represented by the same attorney.

[7] In *Emsing's*, the administrative law judge, limiting his analysis of functional integration between Emsing's Supermarket and Rocky's Supermarket, the alleged single employer, to the time before Emsing's closing in August 1984, found no integration of operations based on a lack of employee interchange and an absence of financial integration. Relying on this factor, the judge further found that Emsing's and Rocky's did not constitute a single employer. In reversing the judge and finding that Emsing's and Rocky's were a single employer, the Board found that the judge erred by unduly emphasizing the factor of functional integration and further found that the judge erred by "underrat[ing] the significance of the August closing transactions and gave insufficient consideration to the actual implications and ramifications of the various financial transactions." *Emsing's Supermarket*, 284 NLRB at 303. In finding that Emsing's and Rocky's were functionally integrated, the Board relied on the following conduct which occurred at the time of Emsing's closing:

factor in the single-employer inquiry is deemed controlling, nor do all of the factors need to be present in order to support a finding of single-employer status. Id.; *Dow Chemical Co.*, 326 NLRB 288 (1998). "Rather, single-employer status depends on all the circumstances, and is characterized by the absence of the arm's-length relationship found between unintegrated entities." *Dow Chemical Co*., 326 NLRB at 288.

Applying these principles, we agree with the judge's finding that Flat Dog and the P.C. are a single employer based on the factors of common ownership, common management, and common control over labor relations. With respect to common ownership, Flat Dog is solely owned by the P.C., which in turn is solely owned by DeMartini. The Board has held that "the relationship of privately held corporate parent to wholly owned corporate subsidiary" demonstrates common ownership for the purpose of single employer status. *Masland Industries*, 311 NLRB 184, 186 (1993); *Dow Chemical*, 326 NLRB at 288.

Moreover, both corporations are also managed by DeMartini, who serves as chief executive officer, chief financial officer, and corporate secretary of each. As the P.C.'s sole officer and shareholder, DeMartini retains the authority to control labor relations at the P.C. DeMartini enjoys similar control over labor relations at Flat Dog. He hired the production crew for the Film, and (as found in the underlying unfair labor practice proceeding) he discharged the striking members of that crew.

In finding the single-employer relationship, however, we do not rely on the fourth factor, interrelation of operations. Although the P.C. and Flat Dog operate from the same corporate offices, there is no evidence that the two corporations are functionally integrated. The P.C., a firm devoted primarily to offering legal services, and Flat Dog, a film production company, have different business purposes and operations. Contrary to the judge's implication, the mere facts that the P.C. loaned out DeMartini to Flat Dog and supplied Flat Dog's initial financing do not, without more, evidence that the P.C. and Flat Dog were functionally integrated. Further, at the time Flat Dog closed production of the Film in Los Angeles and thereafter when Flat Dog worked on the Film in Mexico, Flat Dog's financial transactions were limited to its dealings with Dragon, with no involvement of the P.C. Cf. *Emsing's Supermarket*, 284 NLRB at 303 and fn. 7 above. Based on the above, we find that the evidence does not support a finding of functional integration between Flat Dog and the P.C.

As explained above, however, we rely on the factors of common ownership, common management, and common control of labor relations to conclude that Flat Dog and the P.C. are a single employer under Board law. Thus, under a theory of derivative liability, the P.C. is liable to the same extent as Flat Dog for the backpay due in this case. See *Emsing's Supermarket*, 284 NLRB at 304; *Darlington Mfg. Co.*, 139 NLRB 241, 258 (1962).

B. Liability of DeMartini—Piercing the Corporate Veil

1. Preliminary considerations

The judge found it appropriate to pierce the corporate veils of Flat Dog and the P.C. in order to impose personal liability on DeMartini. The Respondents except, asserting that the evidence does not justify this extraordinary measure. We find merit in the Respondents' exceptions. As the Supreme Court has explained, "[t]he insulation of a stockholder from the debts and obligations of his corporation is the norm not the exception." *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 402–403 (1960). This insulation is a critical and longstanding element of the Federal common law of corporations. It reflects a careful policy decision that such protection is necessary in order to encourage business development and entrepreneurship, and is not to be dispensed with lightly. Thus, the party asserting that the corporate veil should be pierced, in this case the General Counsel, has the burden of proof, and that burden is a heavy one. See *Contractors, Laborers, Teamsters & Engin. v. Hroch*, 757 F.2d 184, 190–191 (8th Cir. 1985).[8]

(1) Rocky's issued a check dated 22 August 1984 to a meat supplier in the amount of $3174.88 to cover an Emsing's check which had been returned due to insufficient funds. (2) Alan and Teri Emsing [the owners of both Emsing's and Rocky's] had personally purchased a 1983 Oldsmobile and put the title in the name of Emsing's Supermarket. When Emsing's closed, ownership of the vehicle was transferred to Rocky's. (3) When Emsing's closed, inventory which suppliers would accept was returned, but $45,000 worth of its inventory which was nonreturnable was transferred to Rocky's without regard to whether Rocky's actually needed it or not. . . . Rather than pay Emsing's $45,000 outright, Rocky's reduced its accounts payable to Emsing's by paying Emsing's vendors directly for supplies and merchandise that had been furnished to Emsing's when Emsing's was in operation. (4) . . . At the time of closing, Emsing's transferred all its equipment to Rocky's Supermarket in order to prevent it from being locked up by the lessor because Emsing's was in default on its rent. [Ibid.]

As explained below, such functional integration is absent in the present case.

[8] See also *NLRB v. Greater Kansas City Roofing*, 2 F.3d 1047, 1053 fn. 8 (10th Cir. 1993), where the court observed that the burden of proof was on the Board to establish that there was a basis for piercing the corporate veil so as to impose liability on respondent Tina Clark. The court concluded that the finding that there was no evidence on a certain issue (undercapitalization) was "*insufficient to meet this burden and in effect was an improper attempt to shift the burden of proof onto Tina Clark"* (emphasis added).

Our dissenting colleague further asserts that DeMartini should be held personally liable under a purported rule that "when agents of an

In *White Oak Coal Co.*, 318 NLRB 732 (1995), enfd. mem. 81 F.3d 150 (4th Cir. 1996), the Board articulated its test for identifying those extraordinary cases in which a shareholder has so disregarded the separate identity of the corporation that it is appropriate to make his or her personal assets available to remedy the unfair labor practices of the corporation. Under *White Oak*, the Board pierces the corporate veil to hold individual shareholders personally liable for corporate remedial obligations where

> (1) there is such unity of interest, and lack of respect given to the separate identity of the corporation by its shareholders, that the personalities and assets of the corporation and the individuals are indistinct, *and* (2) adherence to the corporate form would sanction a fraud, promote injustice, or lead to an evasion of legal obligations.
>
> When assessing the first prong to determine whether the shareholders and the corporation have failed to maintain their separate identities, we will consider generally (a) the degree to which the corporate legal formalities have been maintained, and (b) the degree to which individual and corporate funds, other assets, and affairs have been commingled. Among the specific factors we will consider are: (1) whether the corporation is operated as a separate entity; (2) the commingling of funds and other assets; (3) the failure to maintain adequate corporate records; (4) the nature of the corporation's ownership and control; (5) the availability and use of corporate assets, the absence of same, or under-capitalization; (6) the use of the corporate form as a mere shell, instrumentality or conduit of an individual or another corporation; (7) disregard of corporate legal formalities and the failure to maintain an arm's length relationship among related entities; (8) diversion of the corporate funds or assets to noncorporate purposes; and, in addition, (9) transfer or disposal of corporate assets without fair consideration. [Id. at 735 (emphasis in original; footnotes omitted).]

2. Application of *White Oak*

a. The first prong of the White Oak test

At the outset, we note that DeMartini is not even a shareholder of Flat Dog. Rather, the P.C. is the sole shareholder of Flat Dog. As noted above, the P.C. is liable for the obligations of Flat Dog because the two corporations are a single employer. However, as discussed below, the evidence is insufficient to pierce the corporate veil of the P.C. to impose individual liability on DeMartini for the obligations of the P.C. Further, the evidence is not sufficient to pierce the corporate veil of Flat Dog, so as to impose individual liability on DeMartini for the obligations of Flat Dog.

Although the judge purported to apply the *White Oak* test to determine whether the corporate veils of Flat Dog and the P.C. should be pierced, she failed to specifically apply the nine factors, set out above, which inform the issue of whether the first prong of the *White Oak* test is satisfied. Rather, the judge summarily concluded that the first prong of the *White Oak* test was satisfied because she found that "neither of Respondents Flat Dog or [the] P.C. has assets that are not easily manipulated by Respondent DeMartini," and that "DeMartini moved among his individual and corporate officer roles without regard to corporate distinctions or ceremony." For the reasons set out below, we find, contrary to the judge, that the first prong of the *White Oak* test is not satisfied and that therefore the corporate veil should not be pierced.

With respect to the two general considerations of the first prong, we acknowledge that, to some degree, DeMartini did not consistently maintain corporate records in transactions among himself and the corporations. However, we find the record devoid of evidence of commingling of corporate and individual DeMartini funds and assets.

Applying the nine *White Oak* factors, as designated by their corresponding numerals set out above, we make the following findings. (1) The evidence fails to establish that Flat Dog and the P.C. were not maintained as entities that were separate and apart from DeMartini. The P.C. operated as a law firm and as a loan-out entity for De-

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employer commit unfair labor practices on behalf of the employer, they themselves may be held fully liable." Our colleague misstates the law. Although the converse is true, i.e., an employer is liable for the unfair labor practices committed by its agents, *Zimmerman Plumbing & Heating Co.*, 325 NLRB 106 (1997), and cases cited therein, an individual is liable for unfair labor practices committed on the employer's behalf only in extraordinary circumstances warranting piercing the corporate veil. *Carpet City Mechanical Co.*, 244 NLRB 1031 (1979), relied on by the dissent, preceded *White Oak* and applied an earlier standard for piercing the corporate veil based on a finding that the individual at issue constituted an alter ego of the respondent corporation. This standard was superseded by the *White Oak* test. As the Board explained in *AAA Fire Sprinkler, Inc*., 322 NLRB 69, 73 (1996), enfd. in part and remanded sub nom. *NLRB v. I.W.G., Inc*., 144 F.3d 685 (10th Cir. 1998): "Contrary to the judge, we do not rely on the alter ego analysis to impose personal liability on Gordon. In our view, the issue of personal liability as to individuals shielded by the corporate form should be determined by employing the veil-piercing analysis set forth [in *White Oak Coal*, 318 NLRB 732 (1995)]." Since our dissenting colleague admits that her finding—-that DeMartini should be held personally liable as an agent of Flat Dog—is based on an analysis "entirely apart from the doctrine of piercing the corporate veil," we reject that analysis as contrary to current Board law. Our dissenting colleague's assertion—that neither *White Oak Coal*, supra, nor *AAA Fire Sprinkler*, supra, "mentions the unfair-labor-practice liability of agents under Sec. 2(2) of the Act"—only proves our point.

Martini's services as a film producer. Flat Dog was incorporated as a production company for a particular feature film. Contrary to the contention of our dissenting colleague, DeMartini's central role in both corporations is alone insufficient to demonstrate that he failed to maintain a distinction between the corporations and his own affairs.

(2) Although the P.C. supplied Flat Dog's initial financing, there is no evidence that DeMartini intermingled his own funds or assets with those of either corporation. Indeed, the evidence is to the contrary. Dragon, a separate corporation with no demonstrated relationship to DeMartini, loaned Flat Dog the money needed to produce the Film through the July 19, 1999 documented loan agreement. Moreover, the record here does not reveal the intermingling of corporate and personal funds on which the Board typically relies in piercing the corporate veil. In *White Oak*, the Board cited the practice of shareholders Jerry and Arlene Deel of using corporate assets for personal purposes, including writing corporate checks to support their church, to renew Jerry's membership in the International Hot Rod Association, to buy house-trailer furniture for their personal benefit, and to pay the Department of Motor Vehicles and an automobile dealer at a time when the corporation involved owned no vehicles. The Deels also used corporate funds to make payments on personal loans. Similarly, in *West Dixie Enterprises*, 325 NLRB 194 (1997), affd. 190 F.3d 1191 (11th Cir. 1999), the corporation's owner and its president paid employees from personal funds, made personal loans to the corporation, used a personal vehicle for corporate purposes, and used corporate funds to pay for the president's apartment for 6 months. We find that DeMartini engaged in no such commingling of funds or use of corporate funds or assets for personal purposes.[9]

(3) DeMartini, however, failed to keep adequate corporate records of the transactions whereby the P.C. loaned the services of DeMartini to Flat Dog and Flat Dog's payment of $35,000 to DeMartini for those services. Flat Dog should have paid the money to the P.C. for the use of the P.C's agent, DeMartini. Because of the absence of records, it is not clear that this was done. However, even if the money were paid directly to DeMartini, that fact alone would not warrant the extraordinary step of piercing the corporate veil.

(4) We recognize that DeMartini was the owner of the P.C., which, in turn, owned Flat Dog, and that DeMartini controlled both corporations. Contrary to our dissenting colleague, we do not find that this fact necessarily renders "meaningless" the separate corporate and individual identities. Nor should it dominate our analysis of the *White Oak* factors so as to trump other equally important factors. Further, by focusing single-mindedly on DeMartini's asserted control of the P.C. and Flat Dog, the dissent repeats the judge's error of concluding, without adequate evidentiary support, that those corporations should be stripped of their corporate character. In so doing, the judge and our colleague use the fact of DeMartini's control to override the *White Oak* analysis, both ignoring the significance of the remaining *White Oak* factors and running afoul of fundamental corporate law. Refusing to recognize a distinction between a corporation and its principal simply because the principal necessarily controls the actions of the corporation effectively denies the intended protections of the corporate form to an entire category of businesses.

(5) The record shows no improper use of corporate assets and no evidence that Flat Dog or the P.C. was undercapitalized. There is no allegation that the loan Flat Dog received from Dragon was insufficient to fund the production work that Flat Dog was required to perform.[10]

(6) In addition, the record does not show that Flat Dog was used "as a mere shell, instrumentality or conduit" of the P.C. or DeMartini. As explained above, DeMartini originally established the P.C. as a law firm. One of the P.C.'s functions was to provide DeMartini's services for film productions on a "loan-out" basis. Even assuming that one of the purposes of incorporating Flat Dog was to shield the P.C. and/or DeMartini from possible liability arising from such a loan-out arrangement, such a purpose is a legitimate one and, without more, does not warrant a finding that Flat Dog is a "mere shell" of either the P.C. or DeMartini that would support piercing the corporate veil.[11]

(7) Although Flat Dog and the P.C. constitute a single employer, the relationship between each and DeMartini has not been shown to be less than arm's length. As explained above,[12] although we found a single-employer relationship, we found specifically that Flat Dog and the P.C. were not functionally integrated with respect to their financial transactions. There is no evidence that DeMartini improperly transferred funds from himself to Flat Dog or to the P.C., either when Flat Dog was the pro-

[9] Our dissenting colleague concludes that corporate and personal assets were "obviously" commingled, but cites no evidence supporting her conclusion.

[10] Cf. *AAA Fire Sprinkler*, 322 NLRB at 74 (startup fund of only $10,000 evidence of undercapitalization).

[11] As explained at 18 C.J.S. *Corporations* § 16 (1990) (footnotes omitted):

> The law permits the incorporation of a business for the very purpose of escaping personal liability . . . and the organization of a corporation for such avowed purpose does not constitute fraud, and is not, by itself, sufficient reason to pierce the corporate veil.

[12] See fn. 7 and accompanying text.

ducer of the Film or when Flat Dog supplied production services to Dragon.

(8) There is no evidence that DeMartini diverted funds or assets to himself from either Flat Dog or the P.C. for noncorporate purposes.[13]

(9) Nor is there evidence that he transferred or disposed of corporate assets without fair consideration. DeMartini's ultimate transfer of the rights to the Film to Dragon after Flat Dog ceased filming was largely dictated by the terms of the agreement between Flat Dog and Dragon.[14] Although DeMartini testified that he worked on the Film in Mexico both as a representative of Flat Dog and in his individual capacity, there is no evidence that any funds were diverted from Flat Dog or the P.C. to pay him for his work there.[15]

Based on the above considerations, we find that the General Counsel has not satisfied his burden of proving that the requirements of the first prong of the *White Oak* test have been met. Ultimately, there is no evidence that the corporate identities of Flat Dog and the P.C. have not been kept separate and apart from each other and from DeMartini, individually. Consequently, we find that there was no misuse of the corporate structure as contemplated in *White Oak*.

b. The second prong of the White Oak test

The judge found that adherence to the corporate form in this case would "'sanction a fraud, promote injustice, or lead to an evasion of legal obligations'" under the second prong of the *White Oak* test.[16] The judge reasoned that "DeMartini's motive in shifting responsibility for the Film to Dragon (at least superficially) and moving its production to Mexico was to avoid the consequences of its employees' protected activities [and t]here *is no reason to suppose the unlawful motives that resulted in employee discharges have altered.*"[17] Although our finding that the first prong of *White Oak* is not met in itself precludes the piercing of the corporate veils of Flat Dog and the P.C., we further find that the judge erred in her findings concerning the second prong.

First, the judge erred in relying on the Respondents' unlawful motivation in committing the underlying unfair labor practices as the basis for finding the second prong satisfied. The Board stated in *White Oak*, with respect to the second prong, that "[t]he showing of inequity necessary to warrant the equitable remedy of piercing the corporate veil must flow from the misuse of the corporate form." 318 NLRB at 735. Thus, the inquiry properly focuses on whether fraud, etc., would result from the Board's recognition of the corporate form for remedial purposes when a respondent has been found to have misused that form, not whether the respondent acted with an unlawful motive in the unfair labor practices being remedied.[18]

Second, we have found that the record does not show the lack of respect of the corporate form necessary to warrant piercing the corporate veil. We have specifically found that the transfer of the film rights to Dragon, and DeMartini's continued involvement in the Film's production after the transfer, relied on by the judge and our dissenting colleague as evidence of misuse of the corporate form, were, in fact, based on the terms of the loan agreement between Dragon and Flat Dog. In addition, there is no evidence that DeMartini used the funds or assets of the P.C. or Flat Dog improperly or diverted them for his personal enrichment, so that it would be necessary to recover them from him in order to effectuate the Board's remedy.

III. CONCLUSION

In the absence of evidence satisfying the *White Oak* test, we conclude that it is not appropriate to pierce the corporate veil to hold DeMartini personally liable for the backpay due. As we have found above, the record in this proceeding contains no evidence that DeMartini used the assets of Flat Dog or the P.C. improperly. Therefore,

[13] Cf. *West Dixie Enterprises*, 325 NLRB at 195 (payment for apartment).

[14] Our dissenting colleague seems to argue that DeMartini disposed of Flat Dog's corporate assets without adequate compensation by finishing the Film in Mexico without further compensation after Flat Dog had assigned the film rights to Dragon. Our dissenting colleague once again overlooks the legal significance of the loan agreement and Flat Dog's obligations arising therefrom. After Flat Dog defaulted on the loan and transferred the film rights to Dragon, Dragon could require Flat Dog to finish production of the Film. In finding that Flat Dog was not compensated for this work, our dissenting colleague ignores the fact that, in exchange for the rights to the Film and Flat Dog's completion of it, Dragon forgave the loan amount, which was well over $1 million. We find forgiveness of such a debt to be "fair consideration" for Flat Dog's work on the Film in Mexico. Moreover, we note that, at the time of the assignment of the film rights, there was no way to predict whether the Film would be profitable.

[15] Cf. *White Oak*, 318 NLRB at 735 (transfer from corporation of mining permit, a major asset, without bona fide consideration to corporation, and shareholders received personal economic benefit from the transfer).

[16] Supp. JD, sec. II,A,3, third par.

[17] Id. (emphasis added; footnote omitted).

[18] Our dissenting colleague, like the judge, relies on DeMartini's involvement in the unfair labor practices in assessing whether piercing the corporate veil is appropriate. Indeed, she revisits the merits of the underlying case to the point of suggesting that DeMartini could and should have avoided the entire course of events by acceding to the Union's demand for recognition of Flat Dog's employees. Neither DeMartini nor Flat Dog was obligated to grant such recognition, and their failure to do so is irrelevant to the issue in this proceeding. We recognize that the corporations committed the unfair labor practices through the conduct of DeMartini, but that does not mean that the veil of those corporations can be pierced.

there is no evidence that the assets of Flat Dog or the P.C. have been diminished by the self-dealing that may accompany a failure to maintain the distinction between the individual and the corporation. Under these circumstances, it is not appropriate to pierce the corporate veil.

In reaching this conclusion, we are mindful of the weighty interest in making the discriminatees whole for the losses they suffered as a result of Respondent Flat Dog's unfair labor practices. We are also mindful, however, of the interest in protecting the principle of limited liability, in reliance upon which so many businesses take up the corporate form. Where, as here, there is no showing under *White Oak* that a shareholder has abused the privilege of doing business in the corporate form, we must respect the corporate entity and the shareholder's reasonable expectation that he or she will not lightly be held accountable for corporate debts. For all these reasons, we conclude that the extraordinary equitable remedy of piercing the corporate veil is not justified and we therefore decline to apply that remedy here.

ORDER

The National Labor Relations Board orders that the Respondents, Flat Dog Productions, Inc. (Flat Dog Corporation) and Frank T. DeMartini, P.C., a single employer, Los Angeles, California, their officers, agents, successors, and assigns, shall make whole the individuals named below, by paying them the amounts following their names, plus interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State laws:

Jason Andrew	$3,508.36
Starr Barry	521.24
Andrew Bikichky	3,381.69
Kevin Boyle	3,504.95
John Bratlien	2,220.29
Mae Brunken	4,000.08
Janos Csomo	1,654.82
Brian Davis	2,843.43
Chris Dechert	990.80
Adam Dodds	0.00
Chad Herr	578.97
Matthew Jakositz	2,098.02
Rick Lawrence	2,992.32
Charlie Lenz	2,933.51
Victor Major	3,377.67
Alex Schmidt	202.55
Matt Smith	2,821.97
Ron Smith II	2,368.13
Anthony Tucker	3,768.06
Gabrael Wilson	2,098.02
Jason Young	1,555.00
TOTAL	$47,419.88

Dated, Washington, D.C. August 31, 2006

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

Under the test established by the Board in *White Oak Coal*,[1] Frank T. DeMartini (DeMartini) is properly held liable for the backpay owed to the employees he unlawfully fired because they went on strike against the film production company that he controlled. The majority's refusal to pierce the corporate veil—DeMartini is shielded, the majority finds, by his professional corporation, the sole shareholder in the production company—elevates the principle of limited liability above the effective enforcement of the National Labor Relations Act. As the judge found, "[e]xcercising complete and sole control over [the corporate entities], . . . DeMartini moved among his individual and corporate officer roles without regard to corporate distinctions or ceremony." Under the circumstances, respecting the corporate form does not "encourage business development and entrepreneurship," as the majority suggests. Instead, it simply makes it easier for persons who commit unfair labor practices to profit from them. Imposing liability on DeMartini, in contrast, is consistent with the established rule that when agents of an employer commit unfair labor practices on behalf of the employer, they themselves may be held fully liable.[2]

I.

The record demonstrates that Respondent DeMartini was the driving force behind the unfair labor practices

[1] *White Oak Coal Co.*, 318 NLRB 732, 735 (1995), enfd. mem. 81 F.3d 150 (4th Cir. 1996).

[2] My dissent is limited to the issue of DeMartini's personal liability. I join the majority in adopting the judge's analysis and findings with regard to the backpay period, backpay amounts, and identification of the discriminatees.

I concur in finding Frank T. DeMartini, P.C. derivatively liable as a single employer with Flat Dog Productions, Inc. (Flat Dog). In its analysis of the single-employer issue, the majority relies on common ownership, common management, and common control of labor relations, but finds that the two entities were not functionally integrated. Because I agree that the other factors amply support a finding of single-employer status, I find it unnecessary to address the question of functional integration or the majority's analysis of that factor.

underlying this case and that the corporate entities involved here were simply his instrumentalities.

Frank T. DeMartini is the sole shareholder, director, and employee of Frank DeMartini, P.C. (the P.C.), a professional corporation, as well as its chief executive officer, its chief financial officer, and its corporate secretary. The P.C. holds the exclusive right to DeMartini's services as a film producer and "loans out" those services for specific film projects.

The P.C. is the sole shareholder of Flat Dog Productions, which DeMartini created solely to produce a film, ultimately called "Crocodile." DeMartini is the sole director of Flat Dog, its chief executive officer, its chief financial officer, and its corporate secretary. Flat Dog secured the right to DeMartini's services as a producer from the P.C.—in other words, DeMartini hired himself to produce the film. There is no record of a "loan-out" agreement between the P.C. and Flat Dog. Nor is there evidence that Flat Dog paid consideration to the P.C. for access to DeMartini's services. According to DeMartini, Flat Dog paid him, in his individual capacity, for his services.

An entity called Dragon Productions A.V.V. (Dragon) loaned Flat Dog the roughly $2.2 million required to make "Crocodile," under an agreement allowing Dragon to require Flat Dog to transfer its rights in the film, if Flat Dog could not finish shooting and did not repay the loan.

After Flat Dog began production, several employees joined a union, went on strike, and picketed the film site. DeMartini fired the employees unlawfully (as the Board has found[3]), stopped filming, and closed the production, putting Flat Dog into default on its loan from Dragon. Dragon, in turn, demanded repayment; in response, DeMartini transferred the film rights to Dragon. DeMartini testified that "there was no way we could complete the picture because of the Union activity, so we decided to turn the picture over to Dragon."

Dragon resumed production of the film in Mexico, with DeMartini serving as producer, through Flat Dog. According to DeMartini, the production was moved from Los Angeles "so that IATSE [the Union] could not follow." Flat Dog paid bills for the production and performed other postproduction tasks, but received no payment or reimbursement. There is no evidence that Flat Dog received any portion of the $4.2 million that "Crocodile" made in gross revenues.

II.

Under the Board's *White Oak Coal* test, "the corporate veil may be pierced when: (1) the shareholder and corporation have failed to maintain separate identities, and (2) adherence to the corporate structure would sanction a fraud, promote injustice, or lead to an evasion of legal obligations." 318 NLRB at 732. Both prongs of the test are met here. DeMartini, the P.C., and Flat Dog are indistinguishable: the two corporations were simply DeMartini's tools. Shielding DeMartini himself from liability, in turn, unjustly rewards the actor whose corporate instrumentalities were utilized in the commission of unfair labor practices and means that those violations of the law may never be fully remedied.

A.

Under the first prong of the *White Oak Coal* test, which asks whether the shareholder and the corporation have maintained separate identities, the Board "will consider generally (a) the degree to which the corporate legal formalities have been maintained, and (b) the degree to which individual and corporate funds, other assets, and affairs have been commingled." 318 NLRB at 735 (footnote omitted). A long list of specific factors is relevant.[4] Here, the relationship between DeMartini and his corporate entities, the P.C. and Flat Dog, is so close that the notion of separate identities is essentially meaningless.

As explained, DeMartini owns and controls the P.C., which has as its primary asset the exclusive right to DeMartini's services as a film producer. DeMartini created and controlled Flat Dog, which was solely owned by the P.C., which DeMartini owned and controlled. Flat Dog "acquired" the right to DeMartini's services from the P.C., but there is no evidence of a "loan-out" agreement between Flat Dog and P.C. and no documentary evidence of consideration paid. (DeMartini testified that Flat Dog paid him $35,000 for his services: i.e., DeMartini paid himself, through Flat Dog.)

Obviously, then, the assets and affairs of DeMartini, the P.C., and Flat Dog were commingled: everything revolved around the services of DeMartini as a film producer. There was nothing distinct about the personalities

[3] *Flat Dog Productions*, 331 NLRB 1571 (2000), enfd. 34 Fed. Appx. 548 (9th Cir. 2002).

[4] As the *White Oak Coal* Board explained, those factors include:

(1) whether the corporation is operated as a separate entity;
(2) the commingling of funds and other assets;
(3) the failure to maintain adequate corporate records;
(4) the nature of the corporation's ownership and control;
(5) the availability and use of corporate assets, the absence of same, or undercapitalization;
(6) the use of the corporate form as a mere shell, instrumentality or conduit of an individual or another corporation;
(7) disregard of corporate legal formalities and the failure to maintain an arm's-length relationship among related entities;
(8) diversion of the corporate funds or assets to noncorporate purposes; and, in addition,
(9) transfer or disposal of corporate assets without fair consideration.

318 NLRB at 735 (footnote omitted).

and assets of DeMartini and the two companies that he controlled. Examining specific *White Oak Coal* factors brings the point home.

Certainly there was a "failure to maintain adequate corporate records," given the lack of documentation for the "loan-out" agreement between the P.C. and Flat Dog covering DeMartini's services and for Flat Dog's payment to DeMartini himself.

With respect to the "nature of the corporation's ownership and control," DeMartini was the sole shareholder and officer of the P.C., which was the sole shareholder of Flat Dog, of which DeMartini was the only director and officer. DeMartini's ownership and control could not be more complete.

The "availability and use of corporate assets"—not least, DeMartini's own services—was entirely in the control of DeMartini. After firing the striking employees and stopping production on the film, for example, DeMartini made the decision to transfer Flat Dog's rights in "Crocodile" to Dragon and to continue working on the film, without compensation. It was entirely up to DeMartini how to dispose of his services and the funds to which he had access in connection with the production of "Crocodile."

The facts amply demonstrate the "use of the corporate form as a mere shell, instrumentality or conduit" for DeMartini himself. And it is obvious that there was no "arm's-length relationship among related entities": DeMartini was necessarily on all sides of every purported transaction between and among himself, the P.C. (owned and controlled by DeMartini) and Flat Dog (owned by the P.C., which DeMartini owned and controlled, and controlled by DeMartini). No one else could have been involved.

With respect to the *White Oak Coal* factors, the majority acknowledges only that DeMartini failed to keep adequate corporate records of certain transactions and that "DeMartini was the owner of the P.C. and, through the P.C., of Flat Dog and controlled both corporations."

The majority asserts that "[t]here is no evidence . . . that Flat Dog was used 'as a mere shell, instrumentality or conduit' of the P.C. or DeMartini." But the record fully supports the judge's findings that (1) "neither . . . Flat Dog or P.C. has assets that are not easily manipulated by DeMartini" (certainly the majority identifies no such assets); and (2) that DeMartini was "firmly and solely in control of all Respondents' actions, financial affairs, and business dealings" (no one else could have been). The P.C. and Flat Dog *were* DeMartini, for every practical purpose.

B.

Because DeMartini, the P.C., and Flat Dog lacked separate identities, the first prong of the *White Oak Coal* test is satisfied here. The second prong of that test, as explained, asks whether "adherence to the corporate structure would sanction a fraud, promote injustice, or lead to an evasion of legal obligations." 318 NLRB at 732. As the *White Oak Coal* Board observed, this "showing of inequity . . . must flow from misuse of the corporate form" and the "individuals charged personally with corporate liability must be found to have participated in the fraud, injustice, or inequity that is found." Id. at 735. *White Oak Coal*'s second prong has been met, as well.

DeMartini himself committed the unfair labor practices underlying this case—the termination of striking employees—presumably to benefit himself and the two corporate entities that are indistinguishable from him.

Moreover, DeMartini created a situation that threatens to frustrate a make-whole remedy for the victims of his illegality. DeMartini's actions effectively put Flat Dog into default on its loan from Dragon. In an attempt to frustrate the right of Flat Dog's employees to win union representation, DeMartini unlawfully fired the striking employees. As the Board has found, this step prompted them to continue the strike as an unfair labor practice strike. *Flat Dog Productions*, supra, 331 NLRB at 1573. Faced with a strike that his illegal conduct had prolonged, DeMartini decided to close production of "Crocodile" in Los Angeles and to move it to Mexico—to escape the Union, as DeMartini has admitted. The halt of production put Flat Dog into default and led to DeMartini's transfer of rights in the film, a major asset, from Flat Dog to Dragon. In his deposition, DeMartini admitted that Flat Dog—which DeMartini created solely for the purpose of producing "Crocodile" using his own services—has no assets. It is not clear how, or whether, the backpay obligation in this case will be satisfied.

Imposing liability only on the two corporations that DeMartini completely dominated, but not on DeMartini, is an obvious injustice. DeMartini's use of the P.C. and Flat Dog as his instrumentalities bears a direct relationship not just to the underlying unfair labor practices, but also to the potential frustration of the backpay remedy in this case.[5] Because DeMartini controls whatever assets

[5] This case is easily distinguishable, then, from the situation in *Greater Kansas City Roofing*, 305 NLRB 720 (1991), enf. denied 2 F.3d 1047 (10th Cir. 1993), in which the Board imposed personal liability on the owner of a successor company for the predecessor company's unfair labor practices, which had been found earlier. Although she was an investor in the predecessor, the new owner played no role in its misconduct and was unaware of the Board's order. There was no

the P.C. and Flat Dog may have, there can be no assurance—absent an order against DeMartini himself—that the corporate entities will satisfy their backpay liability. See *Reliable Electric*, supra, 330 NLRB at 715.

III.

Finally, entirely apart from the doctrine of piercing the corporate veil, it would be proper to impose personal liability on DeMartini. Assuming arguendo that Flat Dog may be regarded as separate from DeMartini, DeMartini himself was Flat Dog's agent. (This is the basis for holding Flat Dog liable for his unlawful conduct in firing the striking employees.) The Board, in turn, has not hesitated to hold an employer's agents (in addition to the employer) liable for the unfair labor practices they have committed.[6]

In *Carpet City Mechanical Co.*, 244 NLRB 1031, 1034 (1979), for example, the Board imposed backpay liability on the principal officer of corporation, observing that "even if [the officer] did not own any stock of the corporation[,] he was subject to no apparent control by anyone else with respect to the commission of unfair labor practices." Following this approach—which does not implicate corporate-veil-piercing considerations at all—would clearly lead to holding DeMartini liable. He, too, was "subject to no apparent control by anyone else" when he committed the unfair labor practices involved here.[7]

causal relationship, then, between the owner's failure to observe corporate formalities with respect to the successor company and any injustice or evasion of legal obligations. In *White Oak Coal*, the Board adopted the test articulated by the Tenth Circuit in denying enforcement to the Board's order in *Greater Kansas City Roofing*. 318 NLRB at 734.

[6] See *Richmond Convalescent Hospital*, 313 NLRB 1247, 1261 (1994). Sec. 2(2) of the Act provides that the "term 'employer' includes any person acting as an agent of an employer, directly or indirectly." 29 U.S.C. § 152(2).

[7] The majority argues that the doctrine of piercing the corporate veil, as articulated in *White Oak Coal* and its progeny, represents the exclusive means of imposing liability on an actor like DeMartini. That view is mistaken. Where individual liability is directly predicated on the individual's commission of unfair labor practices—and not on his ownership of stock in a corporation that is otherwise liable—veil-piercing is not involved. Joan E. Baker, *The Incredible Martin Arsham Case*, 21 U. Toledo L. Rev. 371, 415 (1990). Such an approach is regularly followed by Federal courts to impose personal liability on corporate officials for violations of Federal law. See, e.g., *U.S. v. Northeastern Pharamaceutical Co.*, 810 F.2d 726, 744 (8th Cir. 1986); *Donsco, Inc. v. Casper Corp.*, 587 F.2d 602, 606 (3d Cir. 1978). See generally I Fletcher *Cyclopedia of the Law of Corporations*, Sec. 33 (2006). *AAA Fire Sprinkler, Inc.* 322 NLRB 69 (1996), enfd. in part and remanded, 144 F.3d 685 (10th Cir. 1998), cited by the majority, is not to the contrary. As did *White Oak Coal*, that decision addressed the standard for piercing the corporate veil, not for imposing liability on other grounds. Neither case mentions the unfair-labor-practice liability of agents under Sec. 2(2) of the Act.

IV.

Putting aside the question of whether corporate law somehow trumps labor law,[8] even traditional veil-piercing principles do not compel the result reached here—despite the majority's claim that my position "run[s] afoul of fundamental corporate law." We should not compound the weakness of the Act's remedies by placing artificial obstacles in their way, as the majority does today and as it did in a recent veil-piercing case, *A. J. Mechanical, Inc.*, 345 NLRB No. 22 (2005). The majority insists that it is "mindful of the weighty interest in making the discriminatees whole for the losses they suffered as a result of Respondent Flat Dog's unfair labor practices." But the majority seems blind to the fact that those unfair labor practices were committed by, and for, the very person that its holding shields. In such circumstances, the corporate entity is entitled to just as much respect as it deserves: none at all.

Dated, Washington, D.C. August 31, 2006

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

Brian Gee, Esq., for the General Counsel.
Barbara Fitzgerald and *Vincent Floyd, Attys.*, for Respondent, Flat Dog Productions, Inc., *(Seyfarth Shaw)*, of Los Angeles, California.
Donald A. Barton, Atty., for Respondent, *Frank T. DeMartini, P.C.*, of Los Angeles, California.
Frank t. DeMartini, Atty., pro per, of Los Angeles, California.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. On August 31, 2000, the Board issued its Decision and Order in *Flat Dog Productions, Inc.*, 331 NLRB 1571 (the Board's Order), directing, inter alia, a remedial order against Flat Dog Productions, Inc. (Respondent Flat Dog)[1] to make whole all discriminatees who engaged in an economic strike on and around August 17, 1999, with interest, for any loss of earnings and benefits suffered as a result of the discrimination against them. On June 11, 2002, the United States Court of Appeals for the District of Columbia

[8] See generally Wilson McLeod, *Shareholders' Liability and Workers' Rights: Piercing the Corporate Veil under Federal Labor Law*, 9 Hofstra Labor L. J. 115, 117 (1991) (arguing that "courts and agencies have usually been reluctant to treat labor law questions involving the corporate entity as problems that differ from corporate law disputes, and they have consistently failed to consider whether the rationales of corporate law make intellectual or policy sense in the labor context").

[1] At the supplemental hearing, counsel for Respondent Flat Dog stated the company's accurate name is Flat Dog Corporation.

entered its judgment enforcing the Board's Order in its entirety.[2]

Respondent Flat Dog having failed and refused to pay backpay to the discriminatees in accordance with the Board's Order, and a controversy having arisen over the amount of backpay due under the terms of the Board's Order, on May 22, 2003, the Regional Director for Region 31 issued an amended compliance specification and notice of hearing and thereafter a second amended compliance specification (compliance specification). The compliance specification added Frank T. DeMartini, P.C, (Respondent P.C.), Frank T. DeMartini, individually (Respondent DeMartini or DeMartini), and Dragon Productions A.V.V. (Dragon) as Respondents. The compliance specification further alleged that Respondent Flat Dog and Respondent P.C. are affiliated business enterprises and constitute single employers and alter ego corporations. The compliance specification further alleges that Respondent DeMartini, Respondent Flat Dog, and Respondent P.C. (collectively Respondents) share such a unity of interests as to obviate adherence to corporate forms and that Respondent DeMartini is personally liable for the remedial obligations of Respondents Flat Dog and P.C. At the hearing, counsel for the General Counsel withdrew all allegations relating to Dragon (compliance specification par. 5)[3] and made certain changes in the appendices to the compliance specification.[4]

In their answers, Respondents deny that Respondent Flat Dog and Respondent P.C. are affiliated business enterprises, constitute a single employer under the National Labor Relations Act (the Act), constitute alter ego corporations under the Act, collectively satisfy the Board's jurisdictional standards, and are employers within the meaning of the Act. Respondents also deny that Respondents held such a unity of interest and so lacked respect for the separate corporate identities as to obviate adherence to the corporate forms of Respondents Flat Dog and P.C. Respondents further deny Respondent DeMartini is personally liable for the remedial obligations of Respondents Flat Dog and P.C. Respondents affirmatively defend on grounds that the Board lacks subject matter and personal jurisdiction over Respondent P.C. and Respondent DeMartini, that the statute of limitations bars litigation against Respondent P.C. and Respondent DeMartini, that the doctrine of unclean hands applies, that Respondents have not been afforded due process, that certain alleged discriminatees were not expected to work on or after August 17, 1999,[5] and therefore are not entitled to backpay, and that discriminatees failed to mitigate damages.[6]

Hearing was held in Los Angeles, California, on September 22 and 23, 2003, at which all parties appeared.[7]

On the entire record and after considering the briefs filed by all parties,[8] I make the following

FINDINGS AND CONCLUSIONS

I. THE BOARD'S ORDER

The Board in its unfair labor practice decision herein ordered, in pertinent part, as follows:

> Respondent, Flat Dog Productions, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall . . .
>
> 2. Take the following affirmative action necessary to effectuate the policies of the Act.
>
> ….
>
> (a) Make whole its employees who engaged in an economic strike on August 17, 1999, for any and all losses incurred as a result of Respondent's unlawful discharge of them, with interest. . . .[9]
>
> (b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

II. THE ISSUES

A. Liability

1. The charged entities

At all relevant times, Respondent DeMartini practiced law within the corporate structure of Respondent P.C., which entity was located at 3765 Motor Avenue, Room 710, Los Angeles, California (the Motor Avenue address). At all relevant times, Respondent DeMartini has been Respondent P.C.'s chief executive officer, corporate secretary, chief financial officer, sole director, sole shareholder, and only employee. Sometime in 1999, Respondent P.C. entered into a development agreement

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[2] *NLRB v. Flat Dog Productions*, 34 Fed. Appx. 548 (9th Cir. 2002) (not selected for publication in the Federal Reporter, NO. 01-70346).

[3] Counsel for the General Counsel represented that the withdrawal of allegations was based on the Region's inability to effect service of process on Dragon, a Dutch Antilles' corporation.

[4] Counsel for the General Counsel presented updated revisions to the backpay calculations of the compliance specification at the hearing.

[5] All dates herein are in 1999, unless otherwise specified.

[6] I granted counsel for the General Counsel's motion to strike Respondents' answers insofar as they denied or attempted to bring into issue the unlawfulness of the striker discharges in *Flat Dog,* Id. I have addressed herein only those of Respondents' arguments for which evidence was presented.

[7] At the hearing, Respondents P.C. and DeMartini moved to dismiss allegations of the compliance specification as to them on grounds that neither had been parties in the underlying unfair labor practice adjudication, citing *Northern Montana Healthcare Center,* 178 Fed.3d 1089 (9th Cir. 1999). Inasmuch as all Respondents herein have been served with the compliance specification, have appeared at the hearing, and have been given the opportunity to litigate alter ego and/or single-employer status and liability for the underlying unfair labor practices, I deny the motion. *NLRB v. Deena Artware, Inc.,* 361 U.S. 398, 402 (1960); *NLRB v. H. P. Townsend Mfg. Co.,* 101 F.3d 292, 296 (2d Cir. 1996) ("[A] party may be found to be an alter ego without relitigating the underlying unfair labor practices . . . .").

[8] Respondents P.C. and DeMartini join in the arguments advanced in Respondent Flat Dog's brief.

[9] The Board affirmed the administrative law judge's conclusion the "the discharged strikers are entitled to backpay from the date of the employer's unlawful action until the date he or she would have lawfully been laid off. Reinstatement is not an issue in this case as production of the movie has been completed." *Flat Dog,* supra at 1573. The Board left identification of the strikers to the compliance stage of the proceedings.

for production of a low-budget film about crocodiles attacking college students (the Film).[10]

Respondent P.C. incorporated Respondent Flat Dog for the sole purpose of producing the Film. The corporate address of Respondent Flat Dog was the Motor Avenue address.[11] At all relevant times, Respondent DeMartini served as Respondent Flat Dog's chief executive officer, secretary, chief financial officer, sole director, and designated agent. The sole shareholder of Respondent Flat Dog has been Respondent P.C. Respondent Flat Dog was originally capitalized by Respondent P.C., which secured financing from film distributor and financial lender, Dragon, by loan agreement dated July 19 (the Loan Agreement).[12] Attorney Jason Frankel of the law firm of Barab, Kline & Coate represented Respondent Flat Dog; that law firm also represented Dragon. As to default/disability, the Loan Agreement provided, in pertinent part as follows:

> **8. DEFAULT/DISABILITY.** Upon any material breach by [Respondent Flat Dog] of any of the terms and conditions hereof or upon the occurrence of any Event of Default hereunder, [Dragon] shall have the right to terminate this agreement and require [Respondent Flat Dog] to immediately repay the Loan. If [Respondent Flat Dog] fails to repay the Loan within forty-eight (48) hours of demand by [Dragon], [Dragon] has the unfettered right to require [Respondent Flat Dog] to transfer to [Dragon] . . . any and all rights in and to the Screenplay and Picture . . . and any other rights that [Respondent Flat Dog] may have. . . . In the event of such transfer of rights, [Dragon], at its option, may require [Respondent Flat Dog] to complete the Picture as specified herein. Event of Default shall mean any of the following:
>
> . . . .
>
> 8.2 Any time when [Respondent Flat Dog] is more than two (2) days behind the approved shooting schedule.
>
> . . . .
>
> 8.4 The cessation by [Respondent Flat Dog] of principal photography prior to its completion. Completion of principal photography shall mean photography of all scenes in the approved final shooting script.

2. The production

Filming commenced in early August. Filming progress as charted by daily production records varied from day-to-day. The production records show that prior to August 17, setups ranged from 11–25 per day, while film footage ranged from 1570–8260 feet per day.

As found in the underlying decision, on Tuesday, August 17, certain of Respondent Flat Dog's employees declined to cross a picket line established by International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, AFL–CIO, CLC (the Union), and Respondent Flat Dog terminated them.[13]

By letter dated August 19 and addressed to "All employees and Former Employees," DeMartini wrote, in pertinent part, as follows:

> . . . all of the former employees of this corporation signed a written employment agreement laying out their obligations to the corporation. An unannounced wildcat strike without formal union representation clearly breaches that written employment agreement and is clear legal justification for discharge.
>
> . . . .
>
> . . . This movie is being funded by a single person from the middle east that some of you know and consider to be a friend. . . .[14]
>
> . . . the economics of low budget film making make it impossible to produce a low budget movie in California if we are forced to pay union rates and pension, health, and welfare for movies under two million dollars. . . .The logical result of this is that movie producers have fled in droves to Canada, Australia [etc.]. . . . Against the trend however, we decided to make our movies in California, not in Canada, and to provide employment for local crews rather than Canadian crews. The IATSE's response to this is to organize a wildcat strike, something we find impossible to understand.
>
> . . . we will not cave in to the gangster tactics being employed by IATSE. We have a full crew of honest and upstanding people who want to work on this film at the present time. . . .

Early in the production of the Film, production fell behind one day. As of August 16, Respondent Flat Dog was close to catching up on production (Although a 1-day delay was still noted on the production records.). On and after the strike commenced, the daily production records show the following information:

[10] The Film, originally named "Flat Dog" was eventually released under the title "Crocodile" and as of the hearing date had grossed over $4.2 million.

[11] Although DeMartini testified that Respondent Flat Dog had offices separate from Respondent P.C.'s Motor Avenue address, he was vague as to details and time. I note that letters from Dragon to Respondent Flat Dog were addressed to the Motor Avenue address. I conclude the Motor Avenue address was a communal address for both corporations and, contrary to DeMartini's testimony, that books and records for both corporations were maintained at the Motor Avenue location.

[12] Respondent P.C. currently holds a promissory note from Respondent Flat Dog, having loaned Respondent Flat Dog a sum under $10,000 in the last year.

[13] Production notes state, "Upon arrival to set, production was confronted by I.A.T.S.E. organizers & picketers causing most of the crew…not to report to work. Producer Frank DeMartini had no choice but to fire those individuals for breaching their contracts."

[14] The individual DeMartini referred to was Edward Chamician (Chamician), later listed as an executive producer of the Film and present on the Mexico set at least 2 of the 3 production weeks. DeMartini admitted at the hearing that he did not know to what extent, if any, Chamician was involved in the Film's funding.

Date	*Number of setups*[15]	*Number of film feet shot*
August 17	10	N/A
August 18	4	2720[16]
August 19	11	2400[17]
August 20	0	0[18]

On August 20, after failing to reach agreement with the Union, Respondent Flat Dog closed the production in California. DeMartini, who had had almost hourly conversations about the situation with Dragon's counsel, who was also counsel for Respondent Flat Dog, notified him the production was shut down on August 20. On the same day, Dragon served notice on Respondent Flat Dog that it was in default of the Loan Agreement. A letter from Dragon's attorney (Demand Letter) dated August 20 was hand-delivered to Respondent Flat Dog and reads, in pertinent part:

> Acting on behalf of our client, [Dragon], you are hereby notified that [Respondent Flat Dog] is in default under paragraph 8.4 of [the Loan Agreement] . . . in that [Respondent Flat Dog] has ceased principal photography of the Picture before completion.
>
> Pursuant to paragraph 8 of the Agreement, [Dragon] is terminating the Agreement and hereby demands that [Respondent Flat Dog] repay the loan . . . within forty-eight (48) hours. [Respondent Flat Dog's] failure to repay the Loan may result in its loss of all rights in and to the Picture.

According to DeMartini, he was sure he had discussions with representatives of Dragon about the Demand Letter and as there was "no way we could complete the picture because of Union activity, we decided to turn the picture over to Dragon." DeMartini met with himself as the Flat Dog board of directors, discussed the matter with himself, and issued a "Consent."[19] In exchange for a settlement of the production loan, Respondent Flat Dog ceded all rights in the Film to Dragon by signing a document entitled "Assignment of All Rights," on August 24.[20]

Principal photography resumed on September 6 in Mexico, and the Film was admittedly finished there so that IATSE could not follow the production. Although neither Respondent P.C. nor Respondent Flat Dog had any obligation to complete the Film after having turned over all rights to Dragon, Respondent Flat Dog provided production services for the Film, paying bills and otherwise overseeing production under, according to DeMartini, an oral agreement with Dragon. Some testimonial inconsistency exists in this regard. DeMartini testified that neither Respondent P.C. nor Respondent Flat Dog had any legal responsibility to complete the film but that he was so obligated pursuant to (unexplicated) instructions by counsel for Dragon. DeMartini continued as producer of the Film in Mexico in his individual capacity and also as an officer of Respondent Flat Dog, which served as a contractor to Dragon upon the Film's removal to Mexico. Again, some inconsistency exists in the testimony concerning which entity contracted for and which entity provided production services. DeMartini testified, "Pursuant to the agreement where the P.C. provided services for Flat Dog to produce the movie, under a loan out for me, it paid the salary to . . . me . . . in the amount of I think it was $35,000." DeMartini explained that he had an exclusive employment agreement with Respondent P.C., that in order for Respondent Flat Dog to obtain his individual services to produce the Film, Respondent Flat Dog had to contract with Respondent P.C. for his services. DeMartini, as the only officer of Respondent Flat Dog approved the contract offer. DeMartini, as the officer of Respondent P.C. approved the loan-out. DeMartini, as Respondent DeMartini, agreed to perform the services. DeMartini performed the same services in Mexico as he had in Los Angeles. Respondents presented no documentation of any of these agreements.

Because of inconsistencies in DeMartini's testimony as set forth herein and his resistant manner in testifying, I decline to give weight to any of his testimony unsupported by other indicia of trustworthiness. Accordingly, I conclude that DeMartini, as an individual and/or as the officer of Respondent Flat Dog, oversaw the entire film production in Mexico including the wrap.[21] Thereafter, Respondent Flat Dog, under the auspices of its sole officer, DeMartini, oversaw all postproduction transactions in the United States; it produced no other film.

3. Discussion

Although Respondents argue that Respondent Flat Dog and Respondent P.C. have maintained their separate corporate entities, asserting that they have separate board meetings, offices, telephone numbers, and their books and records are kept at separate locations, I cannot accept those assertions. The evidence as a whole supports a conclusion that Respondents Flat Dog and P.C. are the alter egos of each other and a single employer with regard to the business enterprise that engendered the underlying unfair labor practices, i.e., production of the Film. Respondent Flat Dog and Respondent P.C. shared office space and had the same officer and director, DeMartini. DeMartini exercised complete authority over both corporations and controlled all shares. Any corporate board meetings re-

[15] Every time the camera is moved counts as a setup.

[16] A production note reads, "Even with skeleton replacement crew, company managed to move along with the days' [sic] work."

[17] A production note reads, "*Note: revised total shooting days. . Est. finish date is Tuesday August 31, 1999." Prior scheduled finish date had been August 28.

[18] A production note for August 20 reads, "@ 1:45 pm company officially shut down indefinitely by I.A.T.S.E.'s pressure & threatening actions to director of photography, assoc. producer, & other crew members. Company was forced to leave the country. Nothing was shot today."

[19] Respondent did not produce any document to reflect the "consent."

[20] The only reference to any of Respondent Flat Dog's actions in the minutes of its annual corporate meeting held the following June 2000, at which only DeMartini was present, was a statement that all of the preceding year's acts were ratified and accepted by the corporation.

[21] "Wrap" is the term used for postfilming work of returning equipment, breaking down sets, and finishing everything up. As explained below, I cannot accept DeMartini's testimony that all employees employed on the production in Mexico continued working until the wrap was completed, that is, until everything was done.

garding the Film were neither formal nor documented, and there is nothing to show arms length decisionmaking. Indeed, it is unlikely such evidence could exist, as neither entity has a distinct or viable corporate identity separate from Respondent DeMartini.

As to Respondent DeMartini's liability for the remedial obligations of Respondents Flat Dog and P.C., the Board has found the corporate veil may be pierced when:

> (1) there is such unity of interest, and lack of respect given to the separate identity of the corporation by its shareholders, that the personalities and assets of the corporation and the individuals are indistinct *and* (2) adherence to the corporate form would sanction a fraud, promote injustice, or lead to an evasion of legal obligations. [*White Oak Coal,* 318 NLRB 732, 735 (1995).][22]

Both factors are present here. First, neither of Respondents Flat Dog or P.C. has assets that are not easily manipulated by Respondent DeMartini. Exercising complete and sole control over all Respondents, Respondent DeMartini moved among his individual and corporate officer roles without regard to corporate distinctions or ceremony. His activities so blurred the lines separating Respondents that even he had difficulty relating within which role he handled completion of the Film in Mexico. It is clear that DeMartini finished the Film in Mexico as an amalgam of all three Respondents with DeMartini independently possessing production control over the Film in Mexico just as he had in Los Angeles.[23] Second, eMartini's motive in shifting responsibility for the Film to Dragon (at least superficially) and moving its production to Mexico was to avoid the consequences of its employees' protected activities.[24] There is no reason to suppose the unlawful motives that resulted in employee discharges have altered. With DeMartini firmly and solely in control of all Respondents' actions, financial affairs, and business dealings, adherence to the corporate form would "sanction a fraud, promote injustice, or lead to an evasion of legal obligations." Id.

Accordingly, I find it appropriate to pierce the corporate veils herein, to find Respondents Flat Dog and P.C. to be alter egos of each other, and to hold Respondent DeMartini personally liable, jointly and severally, with Respondent Flat Dog and Respondent P.C. for the backpay due in this case. See *Reliable Electric Co.*, 330 NLRB 714 (2000).

[22] The purpose of ignoring the corporate form is to satisfy liability by reaching the personal assets of an owner or a controlling shareholder. ". . . [the corporate] legal entity may not be disregarded except where equitable considerations require piercing the corporate veil." 18 Am. Jur. 2d *Corporations*, Sec. 44 at 843–844 (1985).

[23] DeMartini used the corporate forms of Respondent Flat Dog and Respondent P.C., in the words of *White Oak*, "as a mere shell, instrumentality or conduit of an individual or another corporation." 318 NLRB at 735.

[24] DeMartini testified, "[T]here was no way we could complete the picture because of union activity, so we decided to turn the picture over to Dragon." "We" can only mean DeMartini in his various roles.

B. Discriminatees

1. Alleged pool of discriminatees

The underlying decision is silent as to the names of those individuals who were employed by Respondent and terminated on August 17. The General Counsel designated 23 employees as discriminatees. Respondent does not dispute that 11 employees who engaged in the strike on August 17 had an expectation of continued employment: Andrew Bikichky, Kevin Boyle, Janos Csoma, Brian Davis, Jason Andrew, Charlie Lenz, Victor Major, Matt Smith, Ron Smith II, Anthony Tucker, and Gabrael Wilson. Respondents dispute that the remaining 12 named discriminatees engaged in the August 17 strike: Starr Barry, John Bratlien, Mae Brunken, Chris Dechert, Adam Dodds, Chad Herr, Matt Jakositz, Rick Lawrence, Alec Shepard, Alex Schmidt, David Sirianni, and Jason Young. Further, Respondents argue that the following employees were on-call employees (day players) without expectation of continued employment: Starr Barry, John Bratlien, Chad Herr, Rick Lawrence, Alex Schmidt, and Alec Shepard. Therefore, Respondents urge, no basis exists for the General Counsel's assumption that these six employees would have worked a set number of hours in the weeks following the strike.

Matthew S. Jakositz (Jakositz), who testified, worked as a set dresser in the art department for the Film production. He signed a deal memo or crew agreement (employment contract) with Respondent Flat Dog, was a full-time employee, and expected to be employed through the entire production. His last day of work on the Film was August 16; he joined the strike on August 17.[25] On the night of August 18 or 19, Jakositz asked Mr. DeMartini if he could have his job back. DeMartini told him to talk to the production manager, but had "no idea" if he did so.[26]

Jason Young (Young), who testified, worked for Respondent Flat Dog as a set lighting technician from August 9 through 14 and August 16. He signed a deal memo with the Company on August 9 and anticipated employment through the end of production. Young joined the strike on August 17.

As to the following individuals, the evidence is set forth below:

[25] In its posthearing brief, Respondent Flat Dog inaccurately states that Matt Jakositz testified he did not engage in the strike. His testimony, while somewhat confused, is clear on that point; he refused to cross the picket line.

[26] Although DeMartini testified that offers to return to work were made to a number of discriminatees, he did not say who had made such offers or on behalf of what entity, and no other evidence regarding offers to return to work was adduced. Respondent Flat Dog's posthearing brief inaccurately states that Matt Jakositz confirmed the strikers were offered reinstatement. I find no evidence that any valid offer to return to work was made to any discharged employee.

Alleged Discriminatee	*Testimony of Mr. DeMartini*	*Testimony of Jason Young*
Starr Barry	Employed at some point by Respondent Flat Dog. Unknown known whether he was a striker. He worked no more than three days on the production.	Starr Barry was on the [picket] line. He did not go back in.
Adam Dodds	Employed at some point by Respondent Flat Dog.[27]	Adam Dodds was on the line. He did not go back in.
Alex Schmidt	May have worked 1-2 days, total, as a day player. Not known whether he was a striker.	Alex Schmidt was on the line. He did not go back in.
John Bratlien	Never heard of before the compliance hearing.	John Bratlien was on the line. He did not go back in.[28]
Chad Herr	Never heard of before the compliance hearing.	Chad Herr is a grip. He was on the line; he did not go back in.[29]
Rick Lawrence	Never heard of before the compliance hearing.	Did not recall Rick Lawrence.[30]
Alec Shepard	May have worked one day as a replacement during August. Not employed on August 16. Do not know whether he was a striker.	Did not recall Alec Shepard.[31]
David Sirianni	May have worked one day as a replacement during August. Not employed on August 16. Not known whether he was a striker. It is possible he quit the production at some point.	Did not recall David Sirianni.[32]
Chris Dechert	May have been employed during August and on August 17, and may have been among the strikers.	Thought he was on the line.[33]
Jason Young	Do not recall his working more than seven days on the production. Do not recall ever signing off on a deal memo for him.[34]	Set forth above.
Mae Brunken	Employed during August as set decorator and a supervisor with authority to hire and fire. Unknown whether she was a striker.[35]	Did not recall Mae Brunken.

[27] No backpay is sought for Adam Dodds.

[28] The acting compliance officer testified that Bratlien informed him that he had signed a deal memo with Respondent Flat Dog as a full-time electrician. I do not base my findings as to John Bratlien on this hearsay evidence.

[29] The parties stipulated that Chad Herr's average weekly hours worked was 17.15.

[30] The acting compliance officer testified that Lawrence informed him he had signed a deal memo with Respondent Flat Dog as a full-time electrician. I do not base my findings as to Lawrence on this hearsay evidence.

[31] The parties stipulated that Alec Shepard's average weekly hours worked was 15.25.

2. Discussion

Respondent Flat Dog argues the General Counsel has not met his burden of establishing the identity of the discriminatees who are the subject of the order in the underlying unfair labor practice decision. While discriminatees were not identified in the underlying unfair labor practice decision, it is clear the entire crew was fired when "Mr. DeMartini announced at the picket line, 'The Company does not recognize that the crew is represented by the Union. The crew is in violation of their written contracts and they're all fired.'"[36]

The Board has stated,

> [R]emedial questions implicate two statutory principles that must be applied. The first principle is that the remedy should restore the status that would have obtained if Respondent had

[32] The parties stipulated that David Sirianni's average weekly hours worked was 24.43.

[33] The production report for August 17 shows Chris Dechert was scheduled but did not report for work.

[34] As indicated above, I have accepted Young's testimony.

[35] Respondents carry the burden of proving supervisory status. *Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001); *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003). Any lack of evidence is construed against the party asserting supervisory authority. *Kentucky River Community Care*, supra. DeMartini's testimony regarding Mae Brunken's authority was conclusionary and unsupported. As I have not found him to be a credible witness, I conclude Respondents have not met their burden of proving Mae Brunken's supervisory status.

[36] *Flat Dog Productions, Inc.*, supra at 1574.

> committed no unfair labor practice. The second principle is that any uncertainty and ambiguity regarding the status that would have obtained without the unlawful conduct must be resolved against the Respondent, the wrongdoer who is responsible for the existence of the uncertainty and ambiguity [Citations omitted.]. [*Campbell Electric Co.,* 340 NLRB 825, 826 (2003).]

Any uncertainties in the identities of the strikers are created, in large part, by DeMartini's wholesale discharge of all striking employees on August 17 and the paucity of employment records, especially the absence employment contracts, the latter of which were in Respondent Flat Dog's control. In these circumstances, it is particularly appropriate to resolve uncertainties against Respondents. With that in mind, if the evidence establishes that certain employees worked in the week prior to the strike and joined the strike, I have concluded they were encompassed by Respondent's wholesale striker discharge and are discriminatees. Further, although evidence may not directly establish an employee's presence on the picket line, if an employee worked during the days immediately prior to the strike but did not work on August 17, I have drawn the inference that such an employee was a striker and unlawfully discharged. As to alleged discriminatees, Alec Shepard and David Sirianni, no probative evidence showed them to have been employed in the days immediately preceding the strike or to have been strikers. Accordingly, I find only the following employees to be discriminatees:

Admitted by Respondents: Jason Andrew, Andrew Bikichky, Kevin Boyle, Janos Csoma, Brian Davis, Charlie Lenz, Victor Major, Matt Smith, Ron Smith II, Anthony Tucker, and Gabriel Wilson.

Worked in Days Preceding Strike but not on August 17: John Bratlien (13.5 h.)[37], Mae Brunken ($166.67), Chris Dechert (1305 h.), Matt Jakositz (13.05 h.),[38] Rick Lawrence (13.00 h.), and Jason Young (13.50 h.).[39]

Established as Strikers through Testimony of Jason Young: Starr Barry, Adam Dodds, Chad Herr, and Alex Schmidt.

C. Backpay

1. The General Counsel's calculations

For all named discriminatees, in conformity to the underlying decision, the General Counsel determined that the backpay period was fully contained within the third calendar quarter of 1999. He selected August 17 as the start date of the backpay period and suspended the backpay period between August 20, the last day of filming in Los Angeles, and September 6, when production recommenced in Mexico. For backpay termination dates, the General Counsel set September 27 for the grip, electrical, and property departments and September 28 for the art department, which took into account an additional 2 and 3 days, respectively, past the close of principal photography (September 25) to wrap the production. This resulted in a conclusion that employees in the grip, electrical, and property departments would have worked 23 days but for their unlawful discharges, while employees in the art department would have worked 24 days, and all others would have worked 21 days. I resolve the uncertainty in when the wrap would have finished against Respondents. DeMartini testified that all work was completed the night of September 25. As noted above, I do not find DeMartini to be generally credible. Moreover, the production records of September 25 make DeMartini's testimony implausible. The production report of Saturday, September 25, shows the following: at least six sets were scheduled, six of the eight character cast worked until 7 p.m., as did the production director, the director of photography, the key makeup and hair person. Special effects and art department employees worked until 7:30 p.m. Evidence establishes that those individuals would not have been involved in any wrap. Accordingly, it is reasonable to infer that actual film production continued until at least 7 p.m. on September 25 and that the wrap was completed in the days following. Respondents having proffered no credible evidence as to when that occurred, I accept the General Counsel's estimation.

In determining the number of hours discriminatees would have worked, the General Counsel used comparable employee analyses or averaged prediscrimination hours worked. In calculating the gross backpay, the General Counsel utilized the average earnings formula, multiplying hourly rate of pay by hours per week by weeks per calendar quarter, plus hourly rate times overtime hours per week times 1.5.[40] Respondent Flat Dog argues that the use of comparable hours from the Mexico part of the production is not reasonable as employees in Mexico worked longer hours and were governed by different governmental overtime regulations than employees in Los Angeles would have been. Since, as stated in *Campbell*, supra, the first principle of remedial questions is that the remedy should restore the status that would have obtained if Respondent Flat Dog had committed no unfair labor practice, what happened in Mexico is significant only as it sets a pattern, in terms of hours worked, for what would have happened had the unfair labor practices not occurred.

Respondents argue that any backpay should end as of the time Respondent Flat Dog ceased production of the Film and transferred its rights in the Film to Dragon, as both actions were lawful pursuant to *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263 (1965). It is true that a total cessation of business is not an unfair labor practice even if motivated by antiunion considerations. Id. Even a partial closure is unlawful only if the purpose is to chill union activity in an employer's remaining operations, Id.

In *Plaza Properties of Michigan, Inc.*, 340 NLRB 983, 989 (2003), the Board recognized a number of exceptions to the *Darlington* principles:

> A closure may violate the Act if it resulted from the unlawful

[37] Jason Young's credible testimony shows John Bratlien was a striker.

[38] Matt Jakositz' credible testimony also confirmed his employment and striker status.

[39] Jason Young's credible testimony also confirmed his employment and striker status

[40] As to discriminatee Mae Brunken, the General Counsel used her daily rate in calculating backpay.

> subcontracting of unit work [citations omitted]. The same is true if the closure is only temporary rather than permanent. See *Bruce Duncan Co., Inc. v. NLRB,* 590 F.2d 1304, 1307 (4th Cir. 1979) (Court's reasoning in *Darlington* is only applicable when the closing of the plant is an actual closing and not a temporary suspension of operations); *NLRB v. Southern Plasma Corp.,* 626 F.2d 1287, 1292 (5th Cir. 1980) (*Darlington* does not permit an employer to close his business temporarily and then reopen it in order to oust the union); see also *Gallup, Inc.,* 334 NLRB 366 (2001), aff'd.[mem. 62 Fed. Appx. 577] (5th Cir. 2003).

Here, Respondent Flat Dog did not actually close its production of the Film, it moved its production to Mexico. While Respondent Flat Dog purportedly transferred rights to the Film, Respondents continued to exercise complete control over the production upon its relocation to Mexico. In those circumstances, the backpay obligation accruing from Respondent Flat Dog's unfair labor practices continued unabated.

2. Discussion

The general principles in determining backpay, as summarized in many Board decisions including *Performance Friction Corp.,* 335 NLRB 1117 (2001), are well established: The General Counsel's must show the gross backpay due each claimant, i.e., the amount the employees would have received but for the employer's illegal conduct. Any backpay computation formula that closely approximates the amount due, if it is not unreasonable or arbitrary in the circumstances, is acceptable. Id; *Reliable Electric Co.,* 330 NLRB 714, 723 (2000) (citations omitted). The comparable or representative approach to determining backpay is an accepted methodology. *Performance Friction Corp.,* supra at 1117. The differences between Mexico and California employment conditions do not alter the reasonableness of the comparability method, particularly as uncertainties or ambiguities are to be resolved in favor of the discriminatee. The burden is on a respondent to establish any affirmative defenses that would mitigate its liability, including the amount of interim earnings to be deducted from the backpay amount due, and any claim of willful loss of earnings. Here, the General Counsel has met his burden of proving gross backpay, and Respondent has not met its burden of proving any affirmative defenses.

I find the General Counsel's calculations to be fair, reasonable, and accurate approximations of the earnings the discriminatees would have enjoyed had they not been unlawfully terminated. See *Weldun International, Inc.,* 340 NLRB 666 (2003).

I recommend that Respondents Flat Dog, P.C., and DeMartini be ordered to pay the following amounts to the employees listed below plus interest accrued to the date of payment.

ORDER

On the basis of the foregoing, and pursuant to Section 10(c) of the Act, I recommend that the Board issue the following Order: [41]

IT IS HEREBY ORDERED that Respondent Flat Dog Productions, Inc. (Flat Dog Corporation), its alter ego, Respondent Frank T. DeMartini, P.C., and Respondent Frank T. DeMartini, individually, their officers, agents, successors, and assigns, shall forthwith make whole the following individuals by paying each of them, respectively, the sum set forth, plus interest and minus tax withholdings, if any, required by Federal and State laws:

Jason Andrew	$3,508.36	Matthew Jakositz	$2,098.02
Starr Barry	521.24	Rick Lawrence	2,992.32
Andrew Bikichky	3,381.69	Charlie Lenz	2,933.51
Kevin Boyle	3,504.95	Victor Major	3,377.67
John Bratlien	2,220.29	Alex Schmidt	202.55
Mae Brunken	4,000.08	Matt Smith	2,821.97
Janos Csomo	1,654.82	Ron Smith II	2,368.13
Brian Davis	2,843.43	Anthony Tucker	3,768.06
Chris Dechert	990.80	Gabrael Wilson	2,098.02
Adam Dodds	0.00	Jason Young	1,555.00
Chad Herr	578.97		

Dated, at San Francisco, CA: November 24, 2003

[41] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Supplemental Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.